Case No. 80-927

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HOWARD LEE THOMAS,
Appellant,

vs.

THE HONORABLE JAMES C. CROUCH,
Judge, Circuit Court,
Douglas County, Missouri,
Respondent.

On Appeal From The Supreme Court of Missouri

JURISDICTIONAL STATEMENT OF APPELLANT, HOWARD LEE THOMAS

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QUESTIONS PRESENTED

I.

The State of Missouri Has Granted To A Criminal Defendant The Right To A Preliminary Hearing Upon A Charge. Appellant Was Charged By The State Of Missouri With The Crime Of Capital Murder, And The Judge At Appellant's Preliminary Hearing Made An Express Finding That There Was No Probable Cause To Hold Appellant For Capital Murder, But Bound Appellant Over For Trial On A Charge Of Second Degree Murder. May The Prosecuting Attorney, Pursuant To Missouri Rule Of Criminal Procedure 23.08, Ignore The Finding Of The Judge At The Preliminary Hearing And File An Information Charging Appellant With Capital Murder, And May The Circuit Judge Proceed To Arraign And Try Appellant On That Information Consistent With The Due Process And Equal Protection Clauses Of The Fourteenth Amendment To The United States Constitution?

II.

The State Of Missouri Has Granted To A Criminal Defendant The Right To A Preliminary Hearing Upon A Charge, And The Missouri Constitution Provides That A Criminal Defendant Shall Have A Right To Bail In All Cases Except Capital Cases Where The Proof Is Evident And The Presumption Of Guilt Great. Appellant Was Charged By The State Of Missouri With Capital Murder, And The Judge At Appellant's Preliminary Hearing Made An Express Finding That There Was No Probable Cause To Hold Appellant For Capital Murder, But Bound Appellant Over For Trial On A Charge Of Second Degree Murder. May The Prosecuting Attorney, Pursuant To Missouri Rule Of Criminal Procedure 23.08, Ignore The Finding Of The Judge At The Preliminary Hearing And File An In-

formation Charging Appellant With Capital Murder, And May The Circuit Judge Proceed To Arraign And Try Appellant On That Information, Thus Subjecting Appellant To A Possible Denial Of His Right To Bail On The Lesser Charge And A Possible Deprivation Of His Liberty, Consistent With The Due Process And Equal Protection Clauses Of The Fourteenth Amendment To The United States Constitution?

PARTIES

The parties on this appeal were parties to the proceedings in the Missouri Supreme Court. In the Missouri Supreme Court, Respondent was represented by the Prosecuting Attorney of Douglas County, Missouri, Mr. Bob House, P.O. Box 68, Ava, Missouri, 65608.

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On Appeal From The Supreme Court of Missouri

JURISDICTIONAL STATEMENT OF APPELLANT, HOWARD LEE THOMAS

OPINION OF THE MISSOURI SUPREME COURT

The opinion of the Missouri Supreme Court in the cause State *ex rel.* Howard Lee Thomas v. Honorable James C. Crouch, Judge, Circuit Court, Douglas County, No. 61932, is reported at 603 S.W.2d 532 (Mo. en banc 1980).

GROUNDS OF JURISDICTION

Appellant takes this appeal from the ruling of the Missouri Supreme Court quashing its preliminary rule in prohibition which directed Respondent to refrain from taking any further

action in the case of State of Missouri, Plaintiff v. Howard Lee Thomas, Defendant, No. CR479-398F pending in the Circuit Court of Douglas County, Missouri. In the Missouri Supreme Court, Appellant challenged the application to him by Respondent of Missouri Rule of Criminal Procedure 23.08 on the grounds, inter alia, that Missouri Rule of Criminal Procedure 23.08, as applied, denied to Appellant rights guaranteed by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. On July 15, 1980, the Missouri Supreme Court handed down its decision which upheld the constitutionality of Missouri Rule of Criminal Procedure 23.08 and the actions of Respondent pursuant thereto. Appellant filed a timely Motion for Rehearing in the Missouri Supreme Court on July 30, 1980, which Motion was overruled by the Missouri Supreme Court on September 9, 1980. On Thursday, December 4, 1980, Appellant filed his Notice of Appeal to the United States Supreme Court in the Missouri Supreme Court.

Appellant brings this appeal pursuant to 28 U.S.C. Section 1257(2), which provides:

> Final judgments or decrees rendered by the highest court of a state in which a division could be had, made be reviewed by the Supreme Court as follows: . . .
>
> > (2) By appeal where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Appellant is cognizant of the fact that a rule of criminal procedure of the State of Missouri rather than a state statute is in issue. Appellant believes that Missouri law would give the same affect to this rule of criminal procedure as it would a statute of the State of Missouri, so that Appellant is entitled to appeal pursuant to 12 U.S.C. Section 1257(2). In this regard, Appellant

would direct the Court's attention to the Missouri Constitution, Article V, Section 5 which provides in part:

> The Supreme Court may establish rules relating to practice, procedure and pleadings for all courts and administrative tribunals which shall have the force and effect of law . . . .

In addition, Missouri Rule of Criminal Procedure 19.02 (1980) provides:

> Rules 19 to 36, inclusive, are promulgated pursuant to authority granted this court by Section 5 of Article V of the Constitution of Missouri and supersede all statutes and court rules inconsistent therewith.

Further, Missouri Rule of Criminal Procedure 19.05 (1980) provides in part that:

> As used in Rules 19 to 36, inclusive, the term "law" includes rules, statutes and judicial decisions . . . .

However, in the event that Appellant is in error in this regard and is not entitled to appeal to this Court, Appellant would alternatively and respectfully request the Court to treat this Jurisdictional Statement as a Petition for Certorari pursuant to United States Supreme Court Rule 17.01(b), in that the ruling of the Missouri Supreme Court on the issues presented is in conflict with the decisions of other states' courts on these questions as discussed, *infra.*

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, 14th Amendment, Section 1

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Missouri Constitution, Article I, Section 20:

That all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great.

Missouri Constitution, Article V, Section 5:

The Supreme Court may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law. The rule shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take affect, but no rule shall take affect before six months after its publication. Any rule may be annulled or amended in whole or in part by a law limited to the purpose.

Section 544.250 R.S.Mo. 1978:

No prosecuting or circuit attorney in this state shall file any information charging any person or persons with any felony, until such person or persons shall first have been accorded the right of a preliminary examination before some magistrate in the county where the offense has alleged to have been committed in accordance with this chapter. And if upon such hearing the magistrate shall determine that the alleged offense is one on which the accused may be released, the magistrate may release him as provided in Section 544.455 conditioned for his appearance at a time certain before a circuit judge or associate circuit judge who is especially assigned, and thereafter as directed by the

court to answer such charges as may be preferred against him, abide sentence and judgment therein, and not to depart the court without leave; provided, a preliminary examination shall in no case be required or same as waived by the person charged with the crime, or in any case wherein information has been substituted for an indictment as authorized by Section 545.300 R.S.Mo.

Section 544.420 R.S.Mo. 1978:

If it appear that a felony has been committed, and that there is probable cause to believe the prisoner guilty thereof, the magistrate shall bind, by recognizance, the prosecutor, and all material witnesses against such prisoner, to appear and testify before the court having cognizance of the offense, on such day as the prosecuting attorney shall designate in writing duly filed with the magistrate at the time, and not to depart such court without leave.

Missouri Rule of Criminal Procedure 23.02 (1979):

No information charging the commission of a felony shall be filed against any person unless the accused shall first have been accorded the right of a preliminary examination before a magistrate in the county where the offense is alleged to have been committed. The accused may waive a preliminary examination after consultation, or after being accorded the right of consultation, with his counsel. A record entry of such waiver shall be made and the magistrate shall hold the accused to answer in the court having jurisdiction of the offense of which he stands. If the offense is bailable and the accused has not been previously admitted to bail, he shall be admitted to bail as provided in these rules. No preliminary examiantion shall be required wherein information has been substituted for an indictment.

Missouri Rule of Criminal Procedure 23.08 (1979):

> If upon examination of the whole matter the magistrate shall determine that no felony has been committed by any person, or that there is no probable cause for charging the accused therewith, he shall discharge such accused. If it appear that a felony has been committed and that there is probable cause to believe the accused guilty, the magistrate shall hold the accused to answer in the court having jurisdiction of the offense. In such case the magistrate may bind any or all material witnesses by bail bonds, to appear and testify before the court having jurisdiction of the offense, on such day as the prosecuting attorney shall designate in writing filed with the magistrate at the time, and not to depart such court without leave.

Missouri Rule of Criminal Procedure 23.10 (1979):

> If the offense for which the accused is bound over is bailable and the accused has not previously been admitted to bail, he shall be admitted to bail upon a bond with sufficient security as provided in these rules. Otherwise, he shall be committed to the couty jail of the county, or other safe place, to be held until discharged by due course of law. When an accused has been committed to jail because of his failure to furnish bail, the magistrate shall endorse on the warrant of commitment the amount of bail required.

Missouri Rule of Criminal Procedure 19.02 (1980):

> Rules 19 to 36, inclusive, are promulgated pursuant to authority granted this court by Section 5 of Article V of the Constitution of Missouri and supersede all statutes and court rules inconsistent therewith.

Missouri Rule of Criminal Procedure 19.06 (1978):

> As used in Rules 19 to 36 inclusive, the term "law" includes rules, statutes and judicial decisions; "oath" in-

cludes affirmations; "prosecuting attorney" includes the circuit attorney of the City of St. Louis, the attorney general of the State of Missouri, and associate and assistant prosecuting attorneys, assistant circuit attorneys and assistant attorneys general where, by law, they are authorized and permitted to act.

STATEMENT OF FACTS

On July 17, 1979 a complaint was sworn out by Mr. Bob House, Prosecuting Attorney, Douglas County, Missouri, charging Appellant, Howard Lee Thomas, with capital murder in the shooting death of one Charles Polatty. A preliminary hearing on the Complaint was held in the Associate Division of the Circuit Court of Douglas County, Missouri, on Wednesday, November 7, 1979, before the Honorable Clyde Rogers, Associate Circuit Judge of Ozark County, Missouri. After hearing the State's evidence, the Honorable Clyde Rogers made certain findings which are set out at Page 2 of the Opinion of the Missouri Supreme Court, included in the appendix to this Jurisdictional Statement. The essence of Judge Rogers' findings was that he did not believe the State had presented any evidence to show deliberation or premediatation on the part of Appellant and that he, therefore, found that a charge of capital murder was not warrranted. Judge Rogers found probable cause to believe Respondent guilty of having committed the crime of second degree murder and bound him over for arraignment and trial on that charge.

Despite these express findings by the Associate Circuit Judge at the preliminary hearing, the Prosecuting Attorney of Douglas County, Missouri thereafter filed an information in the Circuit Court of Douglas County, Missouri on November 14, 1979, charging Appellant with the crime of capital murder. Appellant filed a Motion to Quash the information, alleging that he was being held to answer a charge for which he had been discharged at the preliminary hearing. Appellant's Motion to Quash the in-

formation was overruled by the respondent, the Honorable James C. Crouch, on or about January 2, 1980.

Appellant then filed his Petition for Writ of Prohibition to the Missouri Court of Appeals, Southern District, on or about January 14, 1980, seeking to prohibit the Respondent from proceeding to arraign and try Appellant on the information charging capital murder. Appellant contended in his Petition for Writ of Prohibition that Respondent's action, pursuant to Missouri Rule of Criminal Procedure 23.08, constituted a denial of Appellant's rights to due process and equal protection of the laws under the Fourteenth Amendment to the United States Constitution. The Missouri Court of Appeals denied Appellant's Petition for Writ of Prohibition on January 14, 1980.

Appellant then filed his Petition for Writ of Prohibition in the Missouri Supreme Court on January 21, 1980, restating his constitutional arguments. A Preliminary Rule in Prohibition and Order to Show Cause was entered by the Missouri Supreme Court on February 11, 1980.

On July 15, 1980, the Missouri Supreme Court issued its Opinion in the cause of State of Missouri *ex rel.* Howard Lee Thomas, Relator, v. Honorable James C. Crouch, Judge, Circuit Court, Douglas County, Respondent, No. 61932, quashing its Preliminary Rule in Prohibition. The decision of the Missouri Supreme Court was to uphold the action of Respondent, taken pursuant to Missouri Rule of Criminal Procedure 23.08, and to reject Appellant's constitutional arguments. Appellant then filed his Motion for Rehearing in the Missouri Supreme Court on July 30, 1980, which Motion for Rehearing was overruled by the Missouri Supreme Court on September 9, 1980.

Appellant than filed his Notice of Appeal to this Court in the Missouri Supreme Court on or about December 4, 1980.

QUESTIONS PRESENTED AND ARGUMENT

I.

The State Of Missouri Has Granted To A Criminal Defendant The Right To A Preliminary Hearing Upon A Charge. Appellant Was Charged By The State Of Missouri With The Crime Of Capital Murder, And The Judge At Appellant's Preliminary Hearing Made An Express Finding That There Was No Probable Cause To Hold Appellant For Capital Murder, But Bound Appellant Over For Trial On A Charge Of Second Degree Murder. May The Prosecuting Attorney, Pursuant To Missouri Rule Of Criminal Procedure 23.08, Ignore The Finding Of The Judge At The Preliminary Hearing And File An Information Charging Appellant With Capital Murder, And May The Circuit Judge Proceed To Arraign And Try Appellant On That Information Consistent With The Due Process And Equal Protection Clauses Of The Fourteenth Amendment To The United States Constitution?

The right to a preliminary hearing is accorded a criminal defendant in the State of Missouri before an information charging him with any felony may be filed. Missouri Rule of Criminal Procedure 23.02; Section 544.250 R.S.Mo. 1978. The purpose of the preliminary hearing accorded Appellant was to determine whether there was "probable cause to believe that a felony has been committed and that the defendant has committed it . . ." Missouri Rule of Criminal Procedure 23.08; Section 544.420 R.S.Mo. 1978. Underlying the statute and rule is a concern to protect individuals form groundless prosecution or abuse of prosecutorial discretion.

Appellant is not contending on this appeal that the preliminary hearing itself is a right guaranteed by the Fourteenth Amendment to the United States Constitution. Rather, Appellant submits that where the State of Missouri does grant such a right incident to a criminal prosecution, then the Four-

teenth Amendment due process and equal protection clauses come into play to prevent the State of Missouri from arbitrarily denying or infringing upon that right or discriminating against Appellant in its application. This principle was established by the line of cases beginning with *Griffin* v. *Illinois,* 351 U.S. 12, 100 L. Ed. 891, 76 S.Ct. 585 (1956), where this Court held that the right of appeal, while itself not constitutionally guaranteed, could not be conditioned upon a defendant's ability to pay the cost of obtaining a transcript where such a right was provided by the state. Such an arbitrary infringement on a right granted by the state was held to contravene the due process and equal protection clauses of the Fourteenth Amendment. Similarly, in *Lane* v. *Brown,* 372 U.S. 477, 9 L. Ed. 892, 83 S.Ct. 768 (1963); *Draper* v. *Washington,* 372 U.S. 487, 9 L. Ed.2d 899, 83 S.Ct. 774 (1963); *Smith* v. *Bennett,* 365 U.S. 708, 6 L. Ed. 39, 81 S.Ct. 895 (1961); and *Burns* v. *Ohio,* 360 U.S. 252, 3 L. Ed.2d 1209, 79 S.Ct. 1164 (1959) state action which imposed financial barriers upon the right of appeal granted to criminal defendants by the state was held to violate the Fourteenth Amendment. In *Douglas* v. *California,* 372 U.S. 358, 9 L. Ed.2d 811, 83 S.Ct. 814 (1963), the Court held that where the state grants a right of appeal to a criminal defendant, the Fourteenth Amendment requires that the defendant be able to *effectively* assert that right. Thus, the Court therein held that the state must provide counsel for an indigent defendant on his first appeal as of right.

With regard to a preliminary hearing, it has been held that when such a right is accorded to a defendant under state law, then the preliminary hearing becomes a guarantee protected by the equal protection clause of the Fourteenth Amendment because it is part of the due process of the state. *Guerra* v. *Rodriguez,* 372 F.2d 472 (10th Cir. 1967) and *Silva* v. *Cox,* 351 F.2d 61 (10th Cir. 1965), cert. denied, 383 U.S. 919, 15 L. Ed.2d 673, 86 S.Ct. 915 (1966).

In this case Appellant received a preliminary hearing from the State of Missouri. However, the Prosecuting Attorney of

Douglas County, relying on the provision of Missouri Rule of Criminal Procedure 23.08 that the Judge at the preliminary hearing need only find probable cause that *a* felony was committed, ignored the express findings of the Judge at the preliminary hearing and filed an information charging Appellant with capital murder. That application of Missouri Rule of Criminal Procedure 23.08 allowed the Prosecuting Attorney and Respondent to disregard an express judicial finding of no probable cause for the charge against Appellant, and to instead file an information charging a higher degree of felony than the charge upon which defendant was bound over for trial.

The Missouri Supreme Court upheld the action of the Prosecuting Attorney of Douglas County in filing the information and the Respondent's action in taking cognizance of and proceeding to arraign and try Relator on the disputed information, relying on its earlier holding in *State* v. *Ancell,* 62 S.W.2d 443 (Mo. 1933). The Missouri Supreme Court stated that under Rule 23.08, the findings of the Judge at the preliminary hearing were not binding and that the Prosecuting Attorney was entitled to file an information charging a higher degree of felony.

Appellant submits that the ruling of the Missouri Supreme Court and the action of the Prosecuting Attorney and Respondent herein do not comport with the upgraded status of the preliminary hearing in the criminal law process today, and constitutes an *effective* denial of the right granted to criminal defendants in the State of Missouri to a probable cause determination of a criminal charge prior to defendant's being put in jeopardy for that offense. In line with the Supreme Court's decision in *Coleman* v. *Alabama,* 399 U.S. 1, 26 L. Ed.2d 1209, 90 S.Ct. 1999 (1970), the State of Missouri has also adopted the view that the preliminary hearing is a "critical stage" of the criminal process. *State of Missouri* v. *Morgett,* 526 S.W.2d 434 (Mo. App. 1975). In *State of Missouri* v. *Morgett,* the Court stated that:

> By virtue of the profoundly important nature of the determination to be made by the magistrate at the preliminary hearing stage and the procedural safeguards surrounding an accused with respect thereto, the preliminary hearing in a felony prosecution to be initiated by information is a 'critical stage' of the criminal process and an accused's right to counsel thereat reaches constitutional proportions.

In *State of Missouri* v. *Clark,* 546 S.W.2d 455 (Mo. App. 1977) and *State* v. *Admire,* 495 S.W.2d 132 (Mo. App. 1973), Missouri courts recognized that the magistrate is the sole Judge of the sufficiency and competency of the evidence offered in the preliminary hearing and that his findings upon the evidence are conclusive and bind the proceeding when they are wrong as when they are right. When the state itself attaches such importance to the preliminary hearing and the Judge's findings made therein, it becomes clear that the action of the Prosecuting Attorney and Respondent was improper and effectively denied Appellant due process in the exercise of his right to a preliminary hearing.

Appellant submits that the real purpose of Missouri Rule of Criminal Procedure 23.08 is to allow the Prosecuting Attorney to *reduce* the degree of the offense upon which a criminal defendant is bound over via his information, and that such action is a proper use of prosecutorial discretion. However, the Prosecuting Attorney and Respondent cannot be allowed to unilaterally *increase* the charge facing a defendant after an express finding of no probable cause for such a charge at the preliminary hearing. This is especially true in the present case involving capital murder, as the mere charge of capital murder, as compared with lesser homicide offenses, involves a grave risk of prejudice to Appellant before a jury. In addition, a charge of capital murder involves a possible death penalty or minimum mandatory sentence without possibility of parole as does no other offense under the law of the State of Missouri. Section 565.008 R.S.Mo. 1978. In effect, the Prosecuting Attorney of

Douglas County has made a sentencing decision in increasing the charge in the information from second degree murder to capital murder, and Respondent has condoned that action. If the information is allowed to stand, Appellant will be required to answer for a charge involving a mandatory minimum prison sentence without possibility of probation or parole, at the sole discretion of the Prosecuting Attorney and Respondent, without any judicial determination of probable cause for such a charge with its attendant punishment. A prosecuting attorney has interests wholly adverse to those of a criminal defendant, and should not be allowed to unilaterally make a sentencing decision contrary to the express findings of a judge. *Berra* v. *United States,* 351 U.S. 131, 100 L. Ed. 1013, 76 S. Ct. 685 (1955) (Black, J., dissenting); *Hutcherson* v. *United States,* 345 F.2d 964 (D.C. Cir. 1965), cert. denied, 382 U.S. 894 (1966) (Bazelon, C.J., concurring and dissenting). See also *State of Washington* v. *Pyles,* 9 Wash. App. 246, 511 P.2d 1374 (1973). Appellant faces an immediate threat of prejudice in his upcoming trial and the unilateral action of the Prosecuting Attorney and Respondent has already impinged on Appellant's liberty interest due to the unique nature of the capital murder charge.

Balanced against this imminent prejudice to Appellant, it is apparent that no rights or remedies of the State of Missouri would be infringed by a ruling in Appellant's favor. The State of Missouri has a readily available remedy if the capital murder information is quashed. The Prosecuting Attorney can merely seek a new preliminary hearing and attempt to offer sufficient proof to establish probable cause for the capital murder charge. Such a result would serve the function of complying with Appellant's rights to a probable cause determination and to the discovery of evidence and witnesses against him.

Here, Missouri Rule of Criminal Procedure 23.08, as applied by the Prosecuting Attorney and Respondent, works to deny Appellant the right to an effective preliminary hearing and a pretrial determination of probable cause for the offense with

which he is charged. Such action constitutes an arbitrary denial of the due process right to a preliminary hearing granted by the Missouri rules and statutes, and amounts to a violation of Appellant's rights to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. The holding of the Missouri Supreme Court leaves the Prosecuting Attorney free to determine the degree of offense for which Appellant will be tried, in contradiction to the express findings of the Judge who conducted Appellant's preliminary hearing. The State of Missouri provides no guidelines for the Prosecuting Attorney in exercising such broad prosecutorial discretion. The effect of this action is to allow the Prosecuting Attorney to make a sentencing decision. Such a result constitutes a denial of Appellant's right to equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

However, in the event that Appellant has misconceived his right to appeal in this case and if the Court chooses to treat Appellant's Statement of Jurisdiction as a Petition for Certiorari, Appellant would direct the Court's attention to cases from other jurisdictions which have examined similar situations. These cases have refused to allow an information to stand which varied from the charge upon which the defendant was bound over at the preliminary hearing or which attempted to increase the degree of the offense charged. In *State* v. *McKeehan,* 430 P.2d 886 (Ida. 1968), the caption of the complaint charged defendant with aggravated assault, however, the language of the charging portion of the complaint clearly indicated an aggravated battery. Defendant waived preliminary hearing, and was bound over to the district court on the complaint. The initial information followed the original complaint in containing the same discrepancy between the caption and the charging portion of the information. The state was granted leave to amend the caption of the information before trial to indicate the offense of aggravated battery. Appellant made a timely motion for a preliminary hearing on the amended information, which

motion was denied. The Idaho Constitution, at that time, guaranteed a felony defendant a right to a preliminary hearing, similar to the right guaranteed by Missouri statutes and Supreme Court rules. The court therein held that:

> An accused is denied, therefore, his constitutional right to a preliminary hearing where an information is filed or subsequently amended charging him with a crime of a greater degree or of a different nature than that for which he was held by the committing magistrate. . . .

However, the Court concluded that the amendment permitted in that case did not have the effect of charging a greater or different offense than that contained in the order of committment.

In *Price* v. *State,* 598 P.2d 668 (Okla. Crim. App. 1979), the defendant was charged and bound over on a charge of grand larceny. On the day of trial, the state was allowed to amend the information to charge defendant with grand larceny after former conviction of a felony, and defendant was subsequently convicted on that charge. The conviction was reversed, the Court holding that:

> We have consistently held it to be error to fail to offer proof of a prior felony conviction at the preliminary hearing on a subsequent charge when this charge is being enhanced by the prior conviction. . . . The purpose behind this doctrine is that the accused has the fundamental right to presume that he has been fully complained against in the preliminary hearing and cannot lawfully be held to answer a greater charge entailing more severe penalties.

Similarly, in *State* v. *Branham,* 4 Ariz. App. 185, 418 P.2d 615 (1966), the Court stated that:

> It is well settled in this jurisdiction that the offense filed by the prosecuting attorney can charge only the offense for which the defendant is held to answer in the order of com-

> mittment. . . filing an information charging an offense different from the one for which a defendant has been held to answer operates to deprive the defendant of a preliminary examination as to the charged defense.

See also *People* v. *Hutchinson*, 35 Mich. App. 128, 192 N.W.2d 395 (1971). Appellant submits that the issue in this case was properly addressed by the Supreme Court of Kansas in *State* v. *Turner*, 223 Kan. 707, 576 P.2d 644 (1978), where a defendant was charged with first degree murder and aggravated assault, but the magistrate judge ordered the defendant bound over for a trial on a charge of second degree murder and aggravated assault. The district attorney, being dissatisfied with the magistrate's ruling, filed new charges of first degree murder and aggravated assault against the defendant. The Court held this to be a proper procedure, stating that:

> The examining magistrate's function at a preliminary hearing is to determine probable cause. When the examining magistrate errs in this function by failing to bind the defendant over to the district court for trial on a charge which is warranted by the evidence, the state's only remedy is to dismiss and file another case.

In light of the conflict in the decisions between the Supreme Court of Missouri and the Supreme Courts of Idaho and Kansas and other state appellate courts cited herein, Appellant would respectfully request the Court, if it determines to treat Appellant's Statement of Jurisdiction as a Petition for Certiorari, to grant certiorari and resolve this conflict and to determine that Missouri Rule of Criminal Procedure 23.08, as applied to Appellant, violates his rights to due process and equal protection guaranteed by the Fourteenth Amendment to the United States Constitution.

II.

The State Of Missouri Has Granted To A Criminal Defendant The Right To A Preliminary Hearing Upon A Charge, And The Missouri Constitution Provides That A Criminal Defendant Shall Have A Right To Bail In All Cases Except Capital Cases Where The Proof Is Evident And The Presumption Of Guilt Great. Appellant Was Charged By The State Of Missouri With Capital Murder, And The Judge AT Appellant's Preliminary Hearing Made An Express Finding That There Was No Probable Cause To Hold Appellant For Capital Murder, But Bound Appellant Over For Trial On A Charge Of Second Degree Murder. May The Prosecuting Attorney, Pursuant To Missouri Rule Of Criminal Procedure 23.08, Ignore The Finding Of The Judge At The Preliminary Hearing And File An Information Charging Appellant With Capital Murder, And May The Circuit Judge Proceed To Arraign And Try Appellant On That Information, Thus Subjecting Appellant To A Possible Denial Of His Right To Bail On The Lesser Charge And A Possible Deprivation Of His Liberty, Consistent With The Due Process And Equal Protection Clauses Of The Fourteenth Amendment To The United States Constitution?

Article I, Section 20 of the Missouri Constitution grants every criminal defendant the right to bail in all cases, except for capital offenses when the proof is evident or the presumption great. Here Appellant was bound over at the preliminary hearing on a charge of second degree murder and was released on bail. Thus, the ruling of the Judge at the preliminary hearing affected Appellant's liberty interests and allowed him to remain free on bail. Respondent has, over objection of the Prosecuting Attorney of Douglas County, continued Appellant's bail until the present time. However, the Prosecuting Attorney's action in filing a capital murder information and Respondent's action in taking cognizance of and proceeding to arraign and try Relator on that information constitutes a possible denial of Appellant's

liberty interest in that bail may be denied to Appellant only on a capital murder charge.

This Court has held that convicted felons are entitled to a judicial determination akin to a preliminary hearing before any deprivation of libery occurs with regard to the revocation of parole or probation. *Gagnon* v. *Scarpelli,* 411 U.S. 778, 36 L. Ed.2d 656, 93 S. Ct. 1756 (1973); *Morrissey* v. *Brewer,* 408 U.S. 471, 33 L. Ed.2d 484, 92 S. Ct. 2593 (1972). This Court cannot allow Appellant, who is yet to be tried or convicted of any crime, to be subjected to a deprivation of his liberty without a similar judicial determination of probable cause for the deprivation. Yet, the action of the Prosecuting Attorney and Respondent may effectively result in the deprivation of Appellant's liberty without such a judicial determination of probable cause. Such a result clearly violates the due process clause of the Fourteenth Amendment to the United States Constitution.

Appellant would also refer the Court once again to the discussion under Point I of this Jurisdictional Statement concerning the due process and equal protection implications of a state's arbitrary action in denying a criminal defendant a right which has been previously granted by the state. The decisions previously cited and the reasoning contained therein are equally applicable to Appellant's contentions concerning his right to bail granted by the Missouri Constitution. The holding in the Missouri Supreme Court has left the Prosecuting Attorney and Respondent free to ignore the findings of the Judge at the preliminary hearing concerning the degree of the offense, without imposing any standards or guidelines to be used in exercising that power. Their unilateral decision concerning the degree of the offense facing Appellant can have grave implications for his right to bail under the Missouri Constitution. The holding, therefore, denies to Appellant his rights to equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

CONCLUSION

Appellant respectfully requests this Court to grant his appeal and to overturn the decision of the Missouri Supreme Court as suggested herein.

Respectfully submitted,

WOOLSEY, FISHER,
WHITEAKER, McDONALD
& ANSLEY
WILLIAM H. McDONALD
300 South Jefferson, Suite 600
Springfield, Missouri 65806
Attorneys for Appellant

DATED: December 8, 1980.

APPENDIX

APPENDIX A

No. 61932

IN THE SUPREME COURT OF MISSOURI

May *Session,* 1980

State ex rel. Howard Lee Thomas,
Relator,

vs.

Honorable James C. Crouch, Judge,
Circuit Court, Douglas County,
Respondent.

Prohibition

Now at this day, come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises doth consider and adjudge that the provisional rule in prohibition heretofore issued herein be and the same is hereby quashed.

(Opinion filed.)

STATE OF MISSOURI—Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May *session thereof,* 1980, *and on the* 15th *day of* July 1980, *in the above entitled cause.*

Given under my hand and seal of said Court, at the City of Jefferson, this 15th *day of* May 1980

Thomas F. Simon *Clerk.*
by Mary Elizabeth McHaney D.C.

SUPREME COURT OF MISSOURI

en banc

No. 61932

State of Missouri ex rel. Howard Lee Thomas,
Relator,

vs.

Honorable James C. Crouch, Judge,
Circuit Court, Douglas County,
Respondent.

Original proceeding in prohibition.

On July 17, 1979, the Prosecuting Attorney of Douglas County filed the following complaint in the Douglas County Circuit Court against Howard Lee Thomas and Herbert Leslie Bunch:

> "The Prosecuting Attorney of the County of Douglas, State of Missouri, charges that the defendants, in violation of Section 565.001, RSMo, committed the class A felony of capital murder, punishable upon conviction under Section 565.008.1, RSMo, in that the defendants willfully, knowingly, with premeditation, deliberately and unlawfully killed Charles M. Polatty by shooting him on or about July 17, 1979, thereby causing him to die on or about July 17, 1979 in the County of Douglas, State of Missouri."

On November 7, 1979, a preliminary hearing was accorded Thomas before an associate circuit judge. At the conclusion of the hearing, the associate judge announced his conclusions, as follows:

> "Of course, in a preliminary examination before an Associate Judge, it is not the place of the Court to decide

the truthfulness or untruthfulness of the evidence. The evidence must be viewed in the strongest possible light in favor of the State of Missouri.

"For this reason and from the evidence the state has presented, the Court has no trouble in finding that there is probable cause to believe that the defendant shot the deceased, Mr. Polatty.

"However, the Court doesn't view this as does Mr. House. This was a continuing series of events that happened all the way from Springfield down to this final stop in Douglas County, and the Court does not believe that there is any evidence to show deliberation, possibly no evidence to show premeditation on the part of the defendant.

"The legal definition of premeditation as the Court understands it is thought of beforehand for some period of time, however slight. Well, as Mr. House says, this could be just a second, but it does require thought and deliberation is another thing. It is defined by the courts as being done in a cool state of blood.

"The Court feels that the evidence on the part of the state has shown not a cool state of the blood but the fact that everybody's blood was running hot all the way down from the time they first began to have these quarrels and fights.

"The Court can't agree that because they had had a fight earlier in the evening, that there's probable cause to believe that at that time the defendant started planning the death of the deceased. There are many things about this case that are unanswered and of course it is not my province to speculate on them or go into them, but the Court finds that the elements of premeditation and deliberation do not exist and therefore it is not capital murder.

"Of course, the definition for first degree murder does not enter into this because there is no evidence whatever that this was committed in an arson or a rape or robbery or a burglary, so first degree murder is not possible under the evidence in this case.

"However, the statute does say that all other forms of homicide not specifically declared to be murder in the first degree or capital murder or manslaughter are second degree murder, and the Court finds that there is probable cause to believe that the defendant is guilty of having committed the crime of second degree murder in Douglas County, and that he should be held for arraignment and action of the Circuit Court, Division One, to appear there on their next law day on the first Tuesday in December, December 4th, at 10:00 o'clock, a.m.

"He is to be allowed bond in the sum of $50,000."

On November 14, 1979, the prosecuting attorney filed an information in the Douglas County Circuit Court, charging Thomas with capital murder. A motion to quash the information was overruled. The defendant sought a writ of prohibition in this Court and the preliminary writ issued.

Relator charges that the circuit court is acting in excess of its jurisdiction in attempting to arraign and try relator on a charge of capital murder because the finding at the preliminary hearing that capital murder had not been committed was binding upon the prosecuting attorney and therefore the information charging that offense is void.

Rules of this Court in effect at the time of the preliminary hearing included the following:

Rule 23.02. "No information charging the commission of a felony shall be filed against any person unless the accused shall first have been accorded the right of a preliminary examination before a magistrate in the county

where the offense is alleged to have been committed. The accused may waive a preliminary examination after consultation, or after being accorded the right of consultation, with his counsel. A record entry of such waiver shall be made and the magistrate shall hold the accused to answer in the court having jurisdiction of the offense of which he stands accused. If the offense is bailable and the accused has not previously been admitted to bail, he shall be admitted to bail as provided in these Rules. No preliminary examination shall be required where an information has been substituted for an indictment."

Rule 23.08. "If upon examination of the whole matter the magistrate shall determine that no felony has been committed by any person, or that there is no probable cause for charging the accused therewith, he shall discharge such accused. If it appear that a felony has been committed and that there is probable cause to believe the accused guilty, the magistrate shall hold the accused to answer in the court having jurisdiction of the offense. In such case the magistrate may bind any or all material witnesses by bail bonds, to appear and testify before the court having jurisdiction of the offense, on such day as the prosecuting attorney shall designate in writing filed with the magistrate at the time, and not to depart such court without leave."

Rule 23.10. "If the offense for which the accused is bound over is bailable and the accused has not previously been admitted to bail, he shall be admitted to bail upon a bond with sufficient security as provided in these Rules. Otherwise, he shall be committed to the county jail of the county, or other safe place, to be held until discharged by due course of law. When an accused has been committed to jail because of his failure to furnish bail, the magistrate shall endorse on the warrant of commitment the amount of bail required."

These rules followed generally the statutory provisions relating to preliminary hearings, found in §§ 544.250, 544.410, 544.420 and 544.470, RSMo 1969.

Respondent contends that, under the rules, the associate circuit judge had jurisdiction to determine only whether a felony had been committed and to bind the defendant over to the circuit court upon a finding to that effect and that the specification by the associate circuit judge of the charge on which the defendant was to be bound over was in excess of the associate circuit judge's jurisdiction.

Respondent's reliance is primarily upon State v. Ancell, 333 Mo. 26, 62 S.W. 2d 443 (1933). In *Ancell,* the defendant was charged by information with murder in the first degree. A trial resulted in a verdict of guilty of manslaughter. On appeal the defendant asserted error on the part of the trial court in overruling his plea in abatement based upon attacks against the validity of his preliminary hearing. One of the grounds was that the examining magistrate who conducted the preliminary hearing on a charge of murder in the first degree found probable cause only for the defendant to be held to answer the charge of murder in the second degree. In rejecting this claim of error, the court stated (62 S.W. 2d 446):

> "(a) Appellant's contention that the prosecution should have been abated because he had not been held by the examining magistrate to answer the charge of murder in the first degree contained in the information subsequently filed cannot be sustained. In State *ex rel.* McCutchan v. Cooley, 321 Mo. 786, 12 S.W. (2d) 466, 468, referred to by defendant in his motion for new trial, it was held by this court in banc that the prosecuting attorney was without authority to file an information for felony until there had been a finding by a magistrate on preliminary examination 'that a felony has been committed and that there is probable cause to believe the prisoner guilty thereof,' quoting the

language of the statute, now section 3483, R. S. 1929 (Mo. St. Ann. § 3483). In that case the defendant had been accorded a preliminary and had been discharged by the magistrate. In the instant case he was not discharged. True, he was not held to answer a charge of murder in the first degree. But the magistrate found that a 'crime' had been committed and form the transcript of his proceedings as a whole it clearly appears the crime meant was murder, a felony, and that there was probable cause to believe defendant guilty thereof. That finding meets the requirement of the statute. 'The examining magistrate is not expected or empowered to determine the guilt or innocence of the accused, or to nicely or irrevocably determine the precise offense of which he is guilty.' State v. Flannery, 263 Mo. 579, 592, 173 S.W. 1053, 1057. The separate opinion of Faris and Brown, JJ., in the Flannery Case, in which the above-quoted language occurs, was criticized on another point in State v. Nichols (Mo. Sup.) 49 S.W. 2d 14, but we do not understand it to have been questioned on this point. The reasoning of the principal opinion in that case, by Walker, J., leads to the same conclusion. See, also, State v. Bauer *et al.*, 321 Mo. 603, 12 S.W. 2d 57; State v. Jeffries, 210 Mo. 302, 320, 321, 109 S.W. 614, 14 Ann. Cas. 524. The complaint filed with the justice in this case charged murder in the first degree, which charge included the lower degrees of felonious homicide, to wit, murder in the second degree and manslaughter. The justice found that the felonious act charged, in other words a felony charged in the complaint, had been committed. It was not incumbent upon him to determine the precise degree of the crime found to have been committed nor, in our opinion, could his attempted determination thereof preclude the prosecuting attorney from filing an information charging the higher degree."

Relator advances numerous reasons for the rejection of the holding in *Ancell.* He first argues that *Ancell* is distinguishable

for the reason that there is no indication that the justice of the peace who conducted the preliminary hearing in that case made express findings on the elements of the first degree murder charge which he found to be lacking. Relator points to the specific findings of the associate circuit judge in this case particularly noting the elements of capital murder which he found lacking.

That is not a valid distinction. The problem is the authority of the associate circuit judge to make the finding he made. He cannot expand his authority by being more specific in his findings.

Relator also notes that *Ancell* was a review of the conviction of the defendant for manslaughter upon a trial and contends that the real basis for the holding in *Ancell* was that any error resulting in the use of the disputed information was harmless to the defendant inasmuch as he could have been convicted for manslaughter had the information charged second degree murder, the offense for which the justice purported to bind him over to answer.

This may be a proper limitation of the actual holding of *Ancell*. Obviously that case could have been decided on that ground alone. However, the validity of the court's reasoning with respect to the question here presented may give such reasoning persuasive effect in this case.

Relator's attack upon the reasoning of *Ancell* is premised largely upon the enhanced status of the associate circuit judge who conducted the preliminary hearing in this case over that of the justice of the peace who presided in Ancell's preliminary hearing. Unquestionably the status of the associate circuit judge over that of the magistrate judge whom he succeeded has been raised, just as the status of the magistrate over that of the justice of the peace was elevated. However, an associate circuit judge's jurisdiction is "as now provided by law for magistrate or probate judges" (Mo. Const. art. V, § 18, as amended). Magistrate judges possessed " * * * only those powers which are expressly

granted by statute. * * * No presumptions or inferences will be invoked to enlarge their jurisdiction and they cannot assume or take powers by implication." State *ex rel.* Inland Finance Corporation v. Felder, 370 S.W. 2d 696, 697[1-3] (Mo. App. 1963). The power of an associate circuit judge, under the above constitutional provision, is similarly limited.

Although the improvement in the status of associate circuit judges would obviously provide a valid argument for an extension of the responsibility of that position, the fact remains that present statutes dealing with preliminary hearings remain substantially unchanged from those in existence at the time of the *Ancell* decision. Section 544.420, RSMo 1978, is identical with Section 3483, RSMo 1929, in effect at the time of *Ancell.* In the first Rules of Criminal Procedure adopted by this Court, Rule 23.08 repeated the language of Section 544.420: "If it appear that *a* felony has been committed, * * *." Such was the language of the applicable Rule at the time of the preliminary hearing in this case.

A new Rule 22.07, adopted by this Court June 13, 1979, effective January 1, 1980, relating to preliminary examination, included the following in sub-paragraph (c): "If from the evidence it appears to the judge that there is probable cause to believe that *the felony complained of* has been committed and that the defendant has committed it, the judge shall order him to appear in the court having jurisdiction of the offense; * * *." 580-581 S.W. 2d (Mo. Cases) XXXIII (1979). However, before this rule became effective, it was " * * * modified to conform to the legislation implementing the new judicial article * * * [to] read as follows (in part):

"If from the evidence it appears to the judge that *a* felony has been committed and that the defendant has committed it, the judge shall order him to appear in the court having jurisdiction of the offense; * * * ." 588-589 S.W. 2d (Mo. Cases) XXXV (1979).

Thus as the statutes and rules stood in effect at the time of the preliminary hearing in this case, the authority of the associate circuit judge was to bind the relator over if the judge believed that the defendant had committed *a* felony. As in *Ancell,* the associate circuit judge was not given authority to determine, for purpose of binding a defendant to the circuit court, the degree of the offense. This Court's handling of Rule 22.07 (c) confirms that such is the authority of the court upon a preliminary hearing.

In this case, the associate circuit judge did find that a felony had been committed and that there was reasonable cause to believe the defendant guilty. However, the court went further and attempted to define the degree of the offense to which the defendant would be required to respond in the circuit court. Having no authority to make such a finding, the finding in that regard was void and the prosecuting attorney was entitled to disregard such limitation upon his discretion in selecting the charge, with the complaint, which he would file. The reasoning of *Ancell* remains valid and is dispositive of relator's complaint.

Relator complains that, if he is to be arraigned on a charge of capital murder, he will be deprived of his right to release on bail in violation of Mo. Const. art I, § 20, because capital murder is a non-bailable offense. Respondent's return shows that, over the objection of the prosecuting attorney, the respondent continued the $50,000 bond fixed by the associate circuit judge, and that relator is free under such bond. This complaint of relator gives rise to no lack of jurisdiction of respondent to proceed with the cause on the information filed.

Relator further complains that, although he is now free on bail, he will, if the capital murder charge is permitted to stand, be denied bail and thereby be deprived of his liberty without the benefit of a judicial determination of probable cause for the termination of his liberty, in violation of state and federal due process requirements. This speculative argument does not go to the trial court's jurisdiction. The filing of an information charging

a capital offense does not preclude release on bail. Mo. Const. art I, § 20. Hickman v. O'Connell, 266 S.W. 2d 9 (Mo. App. 1954).

Relator asserts that, if he is required to stand trial on the capital murder information, he will be held to answer for an offense involving a mandatory minimum prison sentence, at the sole discretion of the prosecutor, without the benefit of a judicial determination of probable cause for such charge. He asserts that requiring him to face that charge in such circumstances deprives him of equal protection of the laws, in violation of state and federal constitutional guaranties " * * * in that relator is being denied the right to have his sentencing decision made by a judge and jury, a right accorded to all other criminal defendants under Missouri law."

Relator's contention that the prosecutor has made a "sentencing decision" is without merit. He has merely selected the offense to be charged. Any sentencing decision will be by a judge and jury. Regarding prosecutorial discretion in selecting the offense to be charged, relator relies upon a dissenting opinion in Berra v. United States, 351 U.S. 131, 135 (1956), and an opinion concurring in part and dissenting in part in Hutcherson v. United States, 345 F. 2d 964, 972-977 (D.C. Cir. 1965). The pronouncements relied upon were not accepted in those cases and the recent case of Batchelder v. United States, 442 U.S. 114 (1979), disposes of any equal protection claim based upon prosecutorial discretion as to the offense to be charged.

Relator's double jeopardy complaint is without merit. " * * * [T]he preliminary hearing does not place the accused once in jeopardy, * * * ." State v. Thomas, 529 S.W. 2d 379, 382[3-5] (Mo. 1975).

Writ quashed.

Robert R. Welborn
Special Judge

Rendlen, Welliver, Higgins, JJ., and Stockard, Sp.J., concur; Bardgett, C.J., dissents in separate dissenting opinion filed; Seiler, J., dissents and concurs in separate dissenting opinion of Bardgett, C.J.; Donnelly and Morgan, JJ., not sitting.

Supreme Court of Missouri
en banc

No. 61932

State Of Missouri *ex rel.* Howard Lee Thomas,
Relator,

vs.

Honorable James C. Crouch, Judge,
Circuit Court, Douglas County,
Respondent.

Dissenting Opinion

I respectfully dissent. The complaint filed by the prosecutor alleged the defendant, "in violation of Section 565.001, RSMo, committed the class A felony of capital murder, punishable upon conviction under Section 565.008.1, RSMo, in that the defendants willfully, knowingly, with premeditation, deliberately and unlawfully killed . . .."

A preliminary hearing was held on this complaint pursuant to the governing statutes (§§ 544.250, 544.410, 544.420, and 544.470, RSMo 1978,) and the rules which generally follow the statutes (Rules 23.02, 23.08, and 23.10, Mo. Rules of Court 1979).

The complaint did not, of course, allege the defendant committed "a" felony or simply a homicide. Rules 23.08, Mo. Rules of Court 1979. Rather it alleged a specific crime—capital murder.

At the conclusion of the preliminary hearing the associate circuit judge made a number of findings as set forth in the principal opinion. The sum total of the findings is that the court did not find there was probable cause to believe a capital murder was committed or that the defendant committed capital murder. On that basis, if the rule or statute required that the defendant be discharged unless probable cause be found as to *the* complaint, the defendant would have to have been ordered discharged. This is because probable cause was not found that the *"felony complained of"* was committed and that defendant committed it. In order that the associate circuit judge would not be required to discharge a defendant in those circumstances, even though the judge found probable cause to believe *a* felony had been committed which was within the scope of the complaint, the statute prior to our rule and our rule permit the associate circuit judge to bind a defendant over for trial upon the finding of probable cause as to a felony less than the one alleged in the complaint. § 544.420, RSMo 1978; Rule 23.08, Mo. Rules of Court 1979.

The court rule as to preliminary examination at the time this case was tried was Rule 23 and had been in effect since at least 1959. (See RSMo 1959, Vol. 4, p. 4912). After having published a change in that rule, as set forth in the principal opinion[1] and identified as Rule 22.07(c), the Court modified the published rule and returned to the language of Rule 23 and the statute—§

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[1] "A new Rule 22.07, adopted by this Court June 13, 1979, effective January 1, 1980, relating to preliminary examination, included the following in subparagraph (c): 'If from the evidence it appears to the judge that there is probable cause to believe that *the felony complained of* has been committed and that the defendant has committed it, the judge shall order him to appear in the court having jurisdiction

544.420, RSMo 1978. (The present rule is 22.07, Mo. Rules of Court 1980.) In short, the statute and rule at the time of this preliminary examination were essentially the same as they had been for many years. When one considers the obvious effect of the *proposed* rule, the reason the Court abandoned the proposed rule becomes clear. However, that does not resolve the issue in this case. Had the proposal been in effect, then the associate circuit judge in this case would have been required to discharge the defendant because he found no probable cause as to "the felony complained of". The prosecutor would then have to file *another* complaint charging second-degree murder and proceed to *another* preliminary hearing with all of the attending risks of a defendant absconding, inconvenience of witnesses, lawyers, and others, as well as delay. All of this is unnecessary *if* the associate circuit judge can do as he did here—find no probable cause as to capital murder—"the felony complained of"—but probable cause as to a lesser offense of murder second degree. In this way the right of a citizen to not be brought to trial on a felony charge for which there was no probable cause (capital murder) would be protected, and the efficient administration of justice would still be served by allowing the information to be filed charging a crime for which a judicial determination of probable cause had been made in accordance with the law. Therefore, it is clear that the reason the phrase "*a* felony" was re-adopted was to afford the defendant his full right not to be charged without probable cause and, at the same time, to prevent delay in the proceedings.

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of the offense; * * * ' 580-581 S.W.2d (Mo. Cases) XXXIII (1979). However, before this rule became effective, it was '* * * modified to conform to the legislation implementing the new judicial article * * * [to] read as follows (in part):

'If from the evidence it appears to the judge that *a* felony has been committed and that the defendant has committed it, the judge shall order him to appear in the court having jurisdiction of the offense; * * * .' 588-589 S.W.2d (Mo. Cases) XXXV (1979)." Principal Opinion at 7.

The preliminary examination statutes and rules at the time this preliminary hearing was held were essentially the same statutes and rules which were in effect when State v. Thompson, 392 S.W.2d 617 (Mo. 1965), was decided. Thompson was brought before a magistrate on a complaint alleging attempted robbery (§§ 560.120 and .135, RSMo 1959—robbery; § 556.150, RSMo 1959—punishment for attempts). He waived preliminary examination and was then charged by information with the crime alleged in the complaint—attempted robbery. The information alleged "that defendant did '* * * wilfully, unlawfully and feloniously, make an assault in and upon one Murreldean May Archer, and did then and there attempt to rob and take from her person valuable property in the presence of and against the will of the said Murreldean May Archer, by putting her in fear of some immediate injury to her person, and did then and there fail in the perpetration thereof, * * *.'" *Id.* at 618.

Thompson then moved to remand the case to magistrate court for preliminary hearing and it was so remanded. A preliminary hearing was held and defendant was bound over to circuit court and the original information (attempted robbery) was refiled. Later an amended information was filed charging defendant with assault with malice aforethought with a dangerous and deadly weapon which stated in part, "'* * * did then and there in and upon one Murreldean May Archer, feloniously, on purpose and of his malice aforethought, feloniously assault, beat, wound and stab, the said Murreldean May Archer, with a knife, which was then and there a dangerous and deadly weapon likely to produce death and great bodily harm, which knife he, the said Robert Louis Thompson, then and there had and held in his hand, with intent then and there, the said Robert Louis Thompson, on purpose and of his malice aforethought, feloniously to rob the said Murreldean May Archer, * * *.'" *Id.* at 618.

The quotations are given in order to make clear that the acts alleged against Thompson in the original complaint, informa-

tion, and the amended information concern the same event, victim, and assault. However, the complaint and information upon which the preliminary examination was held charged attempted robbery—not an assault with intent to rob.

Just prior to trial Thompson moved for dismissal, arguing that he had not been afforded a preliminary examination on the charge contained in the information. The *Thompson* opinion describes this as follows:

> "A colloquy then ensued between the court and counsel, defense counsel stating that a new and distinct charge had been filed which was not a 'lesser charge,' while the prosecutor insisted that the facts 'surrounding each of these charges' would be the same and, in essence, that there could have been no difference in the preliminary hearing, that an assault was involved in each charge and that the new charge carried a 'lighter sentence.' The court stated that the amended information did not 'show a great deal of difference from the original information,' except by going into somewhat greater detail, in showing the means of the assault and adding the element of malice, and that the defense was not substantially changed. It concluded that there was not sufficient variance to justify a dismissal. The motion to dismiss was overruled." *Id.* at 619.

The defendant Thompson was convicted of "assault with malice with intent to rob" (*id.* at 619) and sentenced to twenty years' imprisonment. This Court reversed, holding, in essence, that the prosecution could not proceed to trial on the "assault with malice with intent to rob" when the complaint at the preliminary hearing was for attempted robbery. As to whether the charges were for different offenses, the court said, ". . . we hardly see how a defendant could fail to have been prejudiced when, as here, he was put to trial in such a confused situation and where he was tried on a new charge for which he could have received a life sentence as contrasted with a maximum term of

ten years on the original charge." *Id.* at 621. See Payne v. State, 28 Okla.Crim. 218, 235 P. 558 (1925).

In the instant case the prosecutor seeks to put the defendant on trial for "capital murder", which carries a sentence of death or life imprisonment without parole for fifty years. The procedure for trial of a capital murder charge is significantly different from other charges. Also, there has been a judicial determination of no probable cause as to the crime of capital murder in this case. I do not suggest the associate circuit judge's determination of no probable cause as to the crime charged in the complaint is res judicata or forecloses the prosecutor from seeking a probable cause finding on a refiling of the capital murder complaint. He may do so. See State *ex rel.* Brown v. Duggins, ____ S.W.2d ____ (Mo. banc 1980) [#61826], and State *ex rel.* Riggs v. Whipple, ____ S.W.2d ____ (Mo banc 1980) [62136], [both decided 7/15/80]. But I certainly do believe and would hold that the prosecutor is forbidden by § 544.250, RSMo 1969, and § 544.420 to try a defendant upon a charge of a felony for which there has been a preliminary examination determination of no probable cause. To hold otherwise would do violence to the very purpose of preliminary hearings—to prevent the abuse of power by the prosecution. State v. Clark, 546 S.W.2d 455, 462 (Mo.App. 1977).

The very provisions of § 544.420, RSMo 1968, underscores the requirement of an affirmative finding of *probable cause* for a *specific crime* to be made prior to charging the defendant therewith. It provides in part, "If it appears that a felony has been committed, and that there is probable cause to believe the prisoner guilty *thereof,* the magistrate shall bind . . . ." (Emphasis added.) How can it appear to a judge that a felony has been committed without saying what the felony is? How can a judge find probable cause to believe the prisoner guilty "*thereof*" without stating the felony of which he finds the prisoner probably guilty? In my opinion, upon finding probable cause that a felony has been committed and that defendant

committed *it* or is guilty *thereof,* it is axiomatic that the associate circuit judge would have to say *what* the defendant is probably guilty of, either by reference to the complaint or by designation of the crime. This belief is buttressed by § 544.250, RSMo 1978, where the following language appears: ". . . And if upon such [preliminary] hearing the magistrate shall determine that *the* alleged offense is one on *which* the accused may be released, the magistrate may release him . . .." (Emphasis added.) Again, the language presupposes that the finding of probable cause will be with reference to a stated offense. But surely if the associate circuit judge affirmatively finds there to be *no probable cause* to believe a specific crime (capital murder) has been committed or that the prisoner committed it, there can be no doubt that there has been no finding of probable cause with respect to that felony. That, I believe, precludes a prosecution thereon unless and until probable cause is found upon a subsequent complaint and preliminary hearing or an indictment is returned charging that crime.

In State ex rel. Buresh v. Adams, 468 S.W.2d 18 (Mo banc 1971), it was held that a prosecuting attorney could not proceed upon an information charging a crime or crimes which had been the subject of a preliminary hearing where no probable cause was found by the magistrate as to count II of the complaint but was found as to count I. The information charged a continuous series of acts of embezzlement of money and stealing of electricity of which some were the subject of the complaint and some were not. The Court there said, 468 S.W.2d at 22:

> "Respondent's contention that relator was fully advised of the nature of the charges contained in the information by reason of the several complaints that were filed against him misses the point with respect to the primary purpose of a preliminary hearing. In State ex rel. McCutchan v. Cooley, *supra,* l.c. 468, this Court said: 'We also ruled that a purpose of a preliminary examination is "to safeguard them (the accused) from groundless and vindictive pro-

> secutions." State v. Tunnell (Mo.Sup.) 296 S.W. 423, loc.cit. 426; State v. Sassaman, 214 Mo. 695, loc. cit. 723, 114 S.W. 590.' Respondent's contention also ignores the requirements of Sup.Ct. Rules 23.02, 23.08 and Sections 544.250 and 544.410, which require, as a prerequisite to the filing of an information that the magistrate, on preliminary hearing, find that a felony has been committed and that probable cause exists to believe the accused to be guilty thereof. The point is ruled against respondent."

In order to arrive at the foregoing holding, it was necessary to consider the *specific offenses* alleged in the complaint and the magistrate's orders thereon in order to determine whether the defendant had been afforded a preliminary hearing and been bound over on a charge. It was not sufficient to merely conclude the magistrate found probable cause that a (unidentified) felony had been committed.

In Coleman v. Alabama, 399 U.S. 1 (1970), the U.S. Supreme Court held the preliminary examination under Alabama law and procedure was a critical stagee of the state's criminal process and required the accused be afforded a lawyer. *Id.* at 10. This must be considered in light of the fact that in Alabama the preliminary hearing is for the sole purpose of determining whether there is sufficient evidence to warrant presenting the case to the grand jury, and the case can be presented to the grand jury without a preliminary hearing. *Id.* at 8-9. In Missouri the preliminary hearing is essential to the charging process if the charge is to be by information and is certainly more "critical" than in Alabama. In State ex rel. Vaughn v. Morgett, 526 S.W.2d 434 (Mo. App. 1975), the court stated at 436:

> "By virtue of the profoundly important nature of the determination to be made by the magistrate at the preliminary hearing stage (Rules 23.02, 23.08, *supra)* and the procedural safeguards surrounding an accused with respect thereto (Rule 23.03, *supra),* the preliminary hear-

> ing in a felony prosecution to be initiated by information is a 'critical stage' of the criminal process and an accused's right to counsel thereat reaches constitutional proportions. Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970). See also Rule 23.03, *supra,* as amended December 7, 1970, effective July 1, 1971, and the 'Official Note' thereto."

Surely, if the preliminary examination is as important as set forth in *Coleman* and *Morgett,* and is a right of the accused, then meaning must be attributed to the associate circuit judge's determination of no probable cause for a specific felony.

The following two cases, State v. Gladies, 456 S.W.2d 23 (Mo. 1970), and State v. Couch, 523 S.W.2d 612 (Mo.App. 1975), bear significantly on the issue in the instant case and will be so understood if it is borne in mind that the original information referred to in these cases was filed after a preliminary hearing on a complaint or upon waiver of that hearing. It must also be recognized that the "amended informations" referred to would be proper if probable cause had been found at the preliminary hearing as to the offenses charged in the amended information.

In *Gladies* the defendant was charged by information with assault with intent to rape. The prosecutor amended the information by adding the words "with malice aforethought". This changed the charge from assault under § 559.190 to assault with malice under § 559.180, RSMo 1959. The latter section proscribes a more serious crime and prescribes a graver range of punishment. 456 S.W.2d at 24. The Court held at 456 S.W.2d at 25:

> "The purported amendment and subsequent proceedings were a nullity. In the first place, the State attempted by way of amendment of an information to charge an offense distinct and different from that charged in the original information. The two offenses proscribed by §§

559.180 and 559.190 are distinct and different, both in degree and in severity and range of punishment. An amendment operating to charge an offense different from that charged in the original information is not permissible, § 545.300; Criminal Rule 24.02; State v. Thompson, Mo.Sup., 392 S.W.2d 617, and cases cited l.c. 620[1,2]."

Thus it is seen that, although the amended information charged what may be considered a *higher degree* of the crime, it was viewed by the Court as "an offense distinct and different" from that charged in the original information and only the words "with malice aforethought" were added. If this is so, then the difference between second-degree murder and capital murder makes them equally—if not more so—distinct and different from each other and precludes an information on capital murder where the only crime upon which probable cause was found was second-degree murder.

In State v. Couch, *supra,* the state was allowed by the trial court to amend an information which changed the charge from assault with intent to rape without malice to a charge of assault with intent to rape with malice. Defendant was convicted and the court of appeals reversed and remanded. The court reiterated that Rule 24.02 prohibits amendments if the effect is to charge an offense different from that charged in the original information. The court then held at 523 S.W.2d 614-15:

"This amended information is identical to the original information except for the name of the charging officer and the addition of the words italicized 'and of his malice aforethought'. The amendment was intended by the state to charge an offense under Section 559.180 and thus attempted to charge a greater offense, distinct and different from the charge originally lodged under Section 559.190. The state, counsel for defendant, and the court proceeded through the trial, verdict, judgment, allocution and sentencing (for five times the maximum penalty provided in Sec-

> tion 559.190) upon this assumption. It is clear, however, that such alteration of the charge by amendment fell squarely within the proscription of Rule 24.02 and the cases cited *supra,* and the proceedings were therefore a nullity."

The court of appeals noted however that the proscription of Rule 24.02 does not apply where the amended information charges a lesser included offense. *Id.* at 615, fn. 1.

Again, the point is that different degrees of a felony which are punishable with differing severity are "different and distinct offenses". And again, these cases have meaning only if one understand that, if the complaint and preliminary hearing were sufficient to justify the amended information, then a defendant would have no valid complaint of variance and the judgment would have been affirmed. This means that to find probable cause of an offense is not sufficient to authorize the prosecuting attorney to file an information charging a higher offense.

State v. Ancell, 62 S.W.2d 443 (Mo. 1933), is, as noted in the principal opinion, the case upon which respondent primarily relies. I am not certain *Ancell* can be distinguished. If not, then I am convinced *Ancell* is wrong and should be overruled if it is read to allow the prosecutor to charge an accused by information with an offense that, on preliminary hearing, the judge found *no probable cause* to believe had been committed or that the accused was probably guilty thereof, which is the case here.

In *Ancell,* the defendant was convicted of manslaughter in a trial wherein he was charged with murder in the first degree. A preliminary hearing had been held on a complaint alleging first-degree murder. The proceedings in the justice of the peace court on the complaint are quite confusing, but the opinion does say the complaint was for first-degree murder and probable cause was found only for murder in the second degree.

The appellant Ancell had no attorney on appeal nor was there a brief filed in his behalf. The Court reviewed the case on the errors claimed in the motion for new trial. The principal opinion sets forth a lengthy quotation from *Ancell* which need not be repeated. However, I view *Ancell* as a case in which this Court found *no prejudice* to Ancell because, although tried on first-degree murder, the conviction was for manslaughter which was within the probable cause finding of murder in the second degree. I take this view because the Court in its opinion also stated at 62 S.W.2d at 446:

> "Moreover, the information charging murder in the first degree included the charge of murder in the second degree, on which defendant had been bound over, and that of manslaughter, of which he was convicted. Had the information charged murder in the second degree it would have included manslaughter just the same, the difference between a charge of murder in the first degree and one of murder in the second degree being that in the former but not in the latter the element of deliberation must be alleged. Under either the accused may be convicted of manslaughter if the evidence so warrants. So that in any event defendant had a preliminary examination and was bound over to answer the charge on which he was convicted."

In the intant case the defendant has not yet been tried and therefore he will be prejudiced if tried for capital murder, a crime for which he was not held by the magistrate.

State v. Ancell, *supra,* was cited recently in State v. Clark, 546 S.W.2d 455 (Mo.App. 1977), in which a conviction of manslaughter upon an information charging second-degree murder was affirmed. A complaint charging Clark with first-degree murder was filed, and the magistrate found a felony had been committed and there was probable cause to believe Clark committed it. An information charging first-degree murder was

then filed in circuit court. It was later amended to charge second-degree murder and the defendant was eventually convicted of manslaughter. In overruling Clark's point of error that the information alleged a different method of killing the deceased than that shown on preliminary hearing, the court of appeals considered our case of State *ex rel.* Buresh v. Adams, *supra,* and stated at 546 S.W.2d 463:

> "In order to bring the present case within the principle of *Buresh* the defendant must show that the addition of the skull fracture as a cause of death constitutes a substantial departure from the complaint. *Buresh* follows the general rule expressed in 21 Am.Jur.2d, Criminal Law, § 451 [also, 42 C.J.S. Indictments and Informations § 73]:
>
> > 'An information filed after a preliminary examination has been held does not have to correspond with the complaint filed with the magistrate. The prosecuting attorney is authorized to file an information charging the offense for which the accused *was held,* or substantially the same offense. He may not add a new offense. And he may not file an information charging an offense completely different from that shown on the preliminary examination.'" (Emphasis added.)

In the instant case the defendant was not *held* by the associate circuit judge for the offense of capital murder. He was held for second-degree murder. *Clark* cites *Ancell* for the proposition that an information may charge an offense included in the complaint. However, in *Clark* the defendant was held on a charge of first-degree murder and the subsequent charge of second-degree murder and the conviction of manslaughter were within the complaint and within the charge—first-degree murder—upon which Clark was held by the magistrate.

I regard it as important that accused persons be afforded preliminary hearings as required by law. I am convinced the law

prohibits a prosecutor from charging a person with a felony where the associate circuit judge has found no probable cause to believe that a felony was committed and therefore did not hold the defendant for that offense.

It is true, of course, that the statutory requirement of a finding of probable cause operates as a curb on the prosecutor's otherwise broad discretion, just as a grand jury does when that method of charging is selected. But that is precisely what the legislature intended by requiring a preliminary hearing and a determination of probable cause by a judge. It is expected that a judge, not being an advocate for either side, would exercise fair and unbiased judgment as to whether the evidence at the preliminary hearing establishes probable cause for some specific crime. In fact, the preliminary hearing requirement of probable cause is the only protection a citizen has against groundless prosecution or substantial overcharging; both of which constitute the charging of a person with a crime without probable cause to believe him guilty. This ought not to be encouraged. The legislature chose to discourage it by requiring a judge to make a finding of probable cause based on evidence in open court as to the crime for which a person is to be held. The associate circuit judge in this case performed his duties in a manner the public has a right to expect of a judge and in accordance with statutory requirements.

The prosecutor in Missouri still has complete discretion over the charge in the complaint. Additionally, if he is not satisfied with the outcome of a preliminary hearing, he may refile a complaint before another judge and obtain another preliminary hearing or proceed by indictment. The safeguard a citizen has is the preliminary hearing before a judicial officer. Its purpose is to protect the citizen from being charged with a felony unless there is probable cause to believe a felony has been committed and the person charged committed it. A prosecutor is not free to charge a person with a crime for which there has been no finding of probable cause as to its occurrence nor as to the accused hav-

ing committed it. And certainly, where the judge specifically finds a lack of probable cause as to a particular offense, the prosecutor is prohibited from charging a person by information with its commission unless and until there is a subsequent find ing of probable cause.

Here the associate circuit judge heard the evidence and found no probable cause to believe capital murder had been committed or that the accused committed it. Therefore, under the statutes noted *supra,* the prosecuting attorney cannot try the accused on the information charging capital murder so long as there is no finding of probable cause in accordance with the law.

I would make the writ absolute and therefore I dissent.

JOHN E. BARDGETT, Chief Justice.

APPENDIX B

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI
65102

September 9, 1980

Mr. William H. McDonald
Mr. John E. Price
P.O. Box 1245 S.S.S.
Springfield, Missouri 65805

In re: State *ex rel.* Howard Lee Thomas v. Hon. James C. Crouch, Judge, Circuit Court, Douglas County Supreme Court No. 61932

Gentlemen:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Relator's motion for rehearing overruled."

Very truly yours,

/s/ Thomas F. Simon
Clerk.

cc: Robert House

APPENDIX C

IN THE SUPREME COURT OF MISSOURI

Case No. 61932

State *Ex Rel* Howard Lee Thomas,
Relator,

vs.

The Honorable James C. Crouch, Judge,
Circuit Court, Douglas County, Missouri,
Respondent.

Notice Of Appeal To The United States Supreme Court

Notice is hereby given that Relator, Howard Lee Thomas, appeals from the order and judgment of the Supreme Court of Missouri quashing its provisional rule in prohibition entered in the above-entitled cause on the 15th day of July, 1980. The Supreme Court of Missouri overruled Relator's Motion for Rehearing in the above-entitled cause on September 9, 1980.

This is a prohibition action wherein Relator challenged the constitutionality of Missouri Rule of Criminal Procedure 23.08 (1979) as applied by Respondent on the ground that Respondent's actions denied Relator his rights as guaranteed by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. The decision of the Missouri Supreme Court upheld the validity of Respondent's actions.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

Dated: December 3, 1980.

WOOLSEY, FISHER, WHITEAKER,
McDONALD & ANSLEY

/s/ William H. McDonald
Attorney for Relator

Certificate Of Service

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause by enclosing the same in an envelope addressed to Mr. Bob House, P.O. Box 68, Ava, Missouri, 65608, with first class postage, fully prepaid, and by depositing said envelope in the United States mail at Springfield, Missouri this 3rd day of December, 1980.

/s/ William H. McDonald